Filed 2/5/16 In re J.B. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.B., a Person Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. D.M., Defendant and Appellant.	F072070 (Super. Ct. No. 516917) **OPINION**
D.M., Petitioner, v. THE SUPERIOR COURT OF STANISLAUS COUNTY, Respondent; STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Real Party in Interest.	F073131

THE COURT*

APPEAL from an order of the Superior Court of Stanislaus County. Ann Q. Ameral, Judge.

Roshni Mehta, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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Mother D.M. appeals from the juvenile court's order terminating her parental rights to her biological son, J.B. She argues reversal is required because the Stanislaus County Community Services Agency (the department) failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). We conclude her appeal is untimely because the trial court found ICWA did not apply at the combined jurisdiction/disposition hearing, and she failed to appeal from that order. Accordingly, we affirm the order terminating her parental rights.

Mother has also filed a document that purports to be a petition for an extraordinary writ. On our own motion we ordered this petition consolidated with this appeal. After reviewing the petition we conclude it has no merit and will deny it.

FACTUAL AND PROCEDURAL SUMMARY

The issue in this case does not require a detailed recitation of the underlying facts. On December 9, 2013, the Department filed a petition alleging J.B. came within the jurisdiction of the juvenile court pursuant to the provisions of Welfare and Institutions Code section 300, subdivisions (b) and (g).[1] The petition alleged that mother had left the

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* Before Levy, Acting P.J., Franson, J. and Smith, J.

1 A first amended petition with additional allegations, most directed at father, was filed on December 27, 2013.

two-year-old child alone at home while she went to a bar, where she became intoxicated and belligerent resulting in the police being called. Mother's home was found to be filthy and unfit for human occupation. The home did not have electricity or natural gas.

J.B. was detained. At the combined jurisdiction/disposition, the allegations of the petition were determined to be true and the juvenile court found J.B. was a person described by section 300, and removed him from the custody of his parents. Reunification services were ordered for both parents.

Approximately two months later, the Department filed a petition seeking to terminate family reunification services for both mother and father. The essence of the petition was that neither parent had participated in reunification services, and had not attended their scheduled visits with J.B. At the hearing on the petition, the juvenile court terminated reunification services for mother, but continued the services for father.

At the 12-month review hearing, the Department recommended that reunification services for father be terminated due to his failure to participate in substance abuse treatment and mental health counseling. After a contested hearing, reunification services for father were terminated. Five months later, the juvenile court terminated mother and father's parental rights after a contested hearing. The juvenile court adopted a permanent plan of adoption.

DISCUSSION

Mother's only argument is that the juvenile court failed to comply with the provisions of the ICWA. Although the Department sent notice to the tribes based on information provided by mother and her relatives, mother asserts the information provided to the tribes was incomplete.

The initial issue is whether mother has forfeited the right to appeal the issue. In *In re Pedro N.* (1995) 35 Cal.App.4th 183 (*Pedro N.*) mother appealed from the order terminating her parental rights. At the initial hearing, mother indicated she was a member of an Indian tribe, thus requiring compliance with ICWA. Initial attempts to

determine if Pedro was an Indian child were unsuccessful because the Department failed to identify with specificity to which tribe mother belonged. At the disposition hearing, mother provided the information necessary to make further inquiry. The juvenile court failed to continue the disposition to permit further inquiry to be made, instead completing the disposition hearing by placing Pedro in foster care and ordering reunification services for mother. Two years later, mother's parental rights were terminated and she appealed alleging the juvenile court erred by failing to comply with the ICWA.

While it appeared the juvenile court erred, we refused to address the issue because mother had failed to raise it in an appeal from the disposition order.

> "Although the proceedings leading up to and including the juvenile court's disposition were appealable [citations], the mother did not raise the question of notice until the court terminated her rights approximately two years later. Appellate jurisdiction to review an appealable order depends upon a timely notice of appeal. [Citation.] An appeal from the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed. [Citation.] Here, the mother could have challenged the court's decision to proceed at the dispositional hearing and did not do so. We therefore conclude she is foreclosed from raising the issue now on appeal from the order terminating her parental rights." (*Pedro N., supra,* 35 Cal.App.4th at p. 189.)

The case before us presents the same issue. We note, however, that unlike *Pedro N.* the question of whether the juvenile court complied with the ICWA is far from clear. We also note there is virtually no evidence that J.B. was an Indian child. The ICWA defines an Indian child as "an unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) In this case, there is no evidence in the record that (1) J.B. is a member of an Indian tribe, (2) J.B. was eligible for membership in an Indian tribe, or (3) mother was a member of an Indian tribe. Instead, mother claimed that her grandmother may have been a member of an Indian tribe. Even if mother's claim is correct, J.B. would not be an Indian child and the ICWA

would not apply. (25 U.S.C. § 1911 (c) [Indian tribe may intervene in proceedings involving an Indian child].)

We need not decide the merits of the issue because mother is foreclosed from now raising the issue on appeal. Procedurally, this case is very similar to *Pedro N.* At the combined jurisdiction/disposition hearing the juvenile court made the finding that the ICWA did not apply, and thereafter proceeded to remove J.B. from the custody of his parents and ordered reunification services for the parents. The reunification efforts for the parents proved unsuccessful, and over one year later the juvenile court finally terminated reunification services for father.

Mother did not appeal after the disposition hearing even though she could have done so. She only appealed after the juvenile court terminated her parental rights. Because she could have challenged the juvenile court's finding that the ICWA did not apply in an appeal from the disposition hearing, but failed to do so, she is foreclosed from raising the issue in an appeal from the order terminating her parental rights.

In an attempt to avoid this result, mother argues the juvenile court found the ICWA did not apply after the Department filed an exparte motion for determination, with no notice to any party and without holding a hearing. The juvenile court then failed, according to mother, to make an oral finding at the jurisdiction hearing that the ICWA did not apply. Mother's argument concludes by asserting the lack of oral finding precluded mother from appealing after the disposition hearing, apparently because she did not have notice of the finding.

We need not decide whether there is merit to mother's reasoning because she misreads the record. The contested jurisdiction/disposition hearing began on March 4, 2014. Evidence was begun, but was not completed within the allotted time, so the matter was continued to March 11, 2014. At this hearing, the testimony was completed. At the end of the testimony, the juvenile court heard argument, then announced its decision on

both the jurisdiction and disposition issues. Mother and father were both represented by counsel and present on both days.

Mother places her reliance on the juvenile court's oral pronouncement after the second day of testimony where, it is true, the juvenile court did not make a finding related to the ICWA. However, at the beginning of the hearing on the first day of testimony the juvenile court stated in open court that notice was properly given and the "Indian Child Welfare Act does not apply." Since the minute order is consistent with the juvenile court's oral findings, and mother was provided with notice of the juvenile court's determination that the ICWA did not apply, we reject her argument and conclude she is foreclosed from raising the issue in this appeal.

We now turn to mother's petition for an extraordinary writ. In the petition, mother admits she had difficulties, but asserts she has made positive changes in her life. She has included numerous documents, which indicate she has participated in some programs, and has apparently obtained housing with the assistance of Stanislaus County Shelter Plus Care Program. Also included is a letter dated over one year ago from Josie's Place Service Team of Stanislaus County Behavioral Health and Recovery Services. Mother asks us in this petition to vacate the section 366.26 hearing, order reunification services, order visitation, and grant her custody of J.B.

We deny the petition for a variety of reasons. Primarily, the relief sought by mother is untimely. At the hearing on February 17, 2015, the trial court terminated reunification services for father and set the matter for a hearing pursuant to section 366.26. The date scheduled for the section 366.26 hearing was June 16, 2015. On March 5, 2015, a Notice of Hearing on Selection of a Permanent Plan was served on mother advising her that at the hearing the juvenile court might terminate her parental rights and

free J.B. for adoption.[2] Mother was represented by counsel throughout this time, and testified at the June 16, 2015, hearing.

Mother's petition for extraordinary writ, and specifically her request to vacate the section 366.26 hearing is untimely. Mother failed to file a notice of intent to file a writ petition, and failed to file the writ petition within the framework provided by California Rules of Court, rule 8.450(d)(4) and section 366.26, subdivision (*l*).

Similarly, many of the issues mother now asks us to consider should have been brought up in either the trial court or in an appeal from the orders terminating the services she now wishes to have, or by writ from the order setting the section 366.26 hearing. Mother's failure to pursue any remedy until this time renders her request untimely.

Finally, our review of the documents filed by mother establishes that they do not support mother's assertion that she has dramatically changed her life. For example, the Sierra Vista Child & Family Services "Child Abuse and Neglect Discharge Report Form," which we understand to be a discharge report from a program in which mother participated, shows mother's progress was unsatisfactory, and that in most categories she either needed improvement or could not be rated at all. For each of these reasons, we find there is no merit to mother's petition.

DISPOSITION

The order appealed from is affirmed and the petition for an extraordinary writ is denied.

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[2] The hearing was not completed on this date and was continued to July 16, 2015, at which time the juvenile court issued its order.